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Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents

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BIOLOGY, GENETICS, NURTURE, AND THE LAW: THE EXPANSION OF THE LEGAL DEFINITION OF FAMILY TO INCLUDE THREE OR MORE PARENTS

Myrisha S. Lewis*

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INTRODUCTION

In 2000, the United States Supreme Court noted that “[t]he demographic changes of the past century make it difficult to speak of an average American

family.”¹ As a result of these demographic changes, “[m]any children are now raised in non-conventional settings.”² These “non-conventional settings” include settings occupied by stepfamilies, single parents, extended family members, individuals who are not genetically or biologically related to the children, and same-sex partnerships and marriages.³ On June 26, 2015, the Supreme Court ruled in *Obergefell v. Hodges* that the fundamental right to marry applies to same-sex couples.⁴ In doing so, the Court noted that a “basis for protecting the right to marry is that it safeguards children and families.”⁵ While children of same-sex couples will now benefit from the recognition of their parents’ marital relationships and the resulting legal protection of their parent-child relationships, these children, and other children of “non-conventional settings,” will continue to form relationships with individuals who are “parents” from the children’s perspective, but not legally. Such relationships still need protection and “safeguarding.”

The legal implications of these aforementioned “non-conventional settings” have been at issue in several other Supreme Court cases including: *Michael H. v. Gerald D.*,⁶ *Moore v. City of East Cleveland*,⁷ and *Adoptive Couple v. Baby Girl*.⁸ As a result, the law has had to adapt to recognize new foundations for parentage and will likely continue to do so.

Currently, there are at least five bases for recognizing parentage:

1. Biology, as evidenced by the presumption that a woman who gives birth to a child is that child’s parent;⁹

* Visiting Assistant Professor, IIT Chicago-Kent College of Law. I would like to thank Barbara Aronstein Black, Kent Greenawalt, and Solangel Maldonado for their comments on my paper at the 2014 Columbia Law School Careers in Law Teaching Moot Workshop, the attendees and organizers of the 2013 Lavender Law Junior Scholars Forum, especially Nancy Polikoff and Courtney Joslin, and Cali Slair for her always helpful comments and edits.

¹ *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion).

² Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 344 (1990).

³ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In *Obergefell*, the Supreme Court held that same-sex couples were entitled to marry in all states and that “there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.” *Id.* at 2607–08. In spite of the Supreme Court’s holding, administrative challenges to same-sex marriage continue. See, e.g., *County Court Clerks Rebel Against Same-Sex Marriage Ruling*, CBSNEWS (July 6, 2015, 3:40 PM), <http://www.cbsnews.com/news/county-court-house-clerks-rebel-against-same-sex-marriage-ruling/> [perma.cc/X5YZ-2F2B].

⁴ 135 S. Ct. at 2607.

⁵ *Id.* at 2600.

⁶ See generally *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁷ See generally *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

⁸ See generally *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

⁹ See, e.g., *In re M.C.*, 123 Cal. Rptr. 3d 856, 871 (Cal. Ct. App. 2011) (“Under the UPA [Uniform Parentage Act], the parent-child relationship between a child and his or her natural mother is established ‘by proof of her having given birth to the child.’ (Fam.Code § 7610, subd. (a).)”).

2. Genetics, which is recognized by the Uniform Parentage Act and is most important in the recognition (or disproving) of paternity;
3. Intent, which is recognized in certain jurisdictions such as California, where a court will conclude—especially when assisted reproductive technology is at issue—that the “parties who had contracted for and intended the pregnancy . . . were [the child’s] legal parents and had support obligations that flowed therefrom,” even though neither parent was biologically (or genetically) related to the child;¹⁰
4. Marriage, as evidenced by the marital presumption which purports that the husband is the father of a child born into the marriage; and
5. Functional or de facto parentage, which is based on a putative parent’s actions.

These many bases for parentage, combined with the realities of reproduction, cohabitation, and family interaction, are the reason why children can have more than two parents. In many states, however, to have three instead of two parents is legally impossible.¹¹ For example, statutory restrictions may require the demonstration of one or two legal parents’ unfitness as parents before a third party can be granted parental rights; these restrictions also prevent the assertion of de facto parenthood.¹² Limiting the number of parents a child can have is noticeably disadvantageous for a child with three fit, putative parents, as the child would be deprived of a parent-child relationship. Indeed, without the legal recognition of full parentage, children may be deprived of important sources of financial support and contact with their perceived parents, which may be traumatic to them.¹³

This article seeks to resolve the questions of who should be recognized as a parent and what the criteria for legal recognition of parentage should be, in light of social and demographic changes. Many other articles focus *solely* on the parental rights of a group that is marginalized when it comes to legal recognition of their significant roles in a child’s life, such as the rights of grandparents, lesbians, same-sex parents, or stepparents.¹⁴ Similarly, the literature that

¹⁰ See Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J. L. & GENDER 217, 220 (2010).

¹¹ See, e.g., *Thomas v. Thomas*, 49 P.3d 306, 309 (Ariz. Ct. App. 2002).

¹² See, e.g., *id.* (explaining that the state statute only permits the granting of custody to a third party upon a showing that it is “significantly detrimental” to award custody to the child’s current legal parent at the time; therefore, awarding custody to a non-legal parent at the same time is not possible since the statute requires an “either-or-decision” and not both). As such, the former same-sex partner who was not recognized as a parent could not share legal custody with the former same-sex partner who was the child’s legal parent. *Id.* The statute referred to in *Thomas* can now be found in Arizona at ARIZ. REV. STAT. ANN. § 25-409 (2015) (“§ 25-409. Third party rights”). In *Thomas*, it is cited as ARIZ. REV. STAT. ANN. § 25-415 (2015).

¹³ See Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 590–91 (2009).

¹⁴ See, e.g., Shreya Atrey, *Divorcing Parents, Alienating Children: Devising a Constructive Theory of Child Rights in Case of Divorce*, 10 WHITTIER J. CHILD & FAM. ADVOC. 181 (2010); Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 500–01 (2014) (discussing equitable parent statutes); Nancy D. Polikoff, *A Mother Should Not*

focuses on children's rights as related to parental recognition tends to classify children by certain subsets, focusing, for example, on the rights of children of same-sex couples.¹⁵ This article departs from the existing literature's approach, instead addressing stepparent adoption, same-sex couples, grandparent visitation, and assisted reproductive technology by creating a solution from the perspective of the "best interests of the child"—the historical leading standard in children's protection—rather than from the perspective of the parents' rights. It is likely that legislatures are not familiar with exactly how the best interests of the child standard operates in practice because it is a family law standard that generally arises in an adjudicatory context. This legislative unfamiliarity should not prevent state legislatures from including provisions in parentage statutes and hopefully conducting legislative inquiries into the best interests of the child through expert testimony and research.¹⁶

Drawing from the best interests of the child standard, this article introduces a new doctrine for parental recognition, "parentage *in praxi*," which requires (1) that a putative parent complete statutorily delineated requirements that culminate in them standing "in the shoes of a parent," and (2) that state law operate to allow a child to have more than two parents—if doing so would be in the best interests of the child. A parent *in praxi* would have the same rights and obligations as a legal parent. This article borrows Professor Susan Frelich Appleton's term of "original parent" to refer to the parents that the law currently identifies as legal parents (those parents who are deemed parents when the child is born).¹⁷ By recognizing parentage *in praxi*, states can protect the relationships that children have formed with putative parents who may not be currently recognized as legal parents, regardless of the parents' legal status in any sphere not concerning the well-being of the child (e.g., marital status, familial status, or gender).

A discussion of parental rights in the context of the best interests of the child is inescapable. Parents have certain enumerated rights and responsibilities

Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century, 5 STAN. J. C.R. & C.L. 201 (2009); Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 284 (2000–2001).

¹⁵ See Tanya M. Washington, *Once Born, Twice Orphaned: Children's Constitutional Case Against Same-Sex Adoption Bans*, 2013 UTAH L. REV. 1003, 1017 (2013) [hereinafter *Once Born, Twice Orphaned*]; see also Tanya Washington et al., *Amicus Brief in United States v. Windsor by Scholars for the Recognition of Children's Constitutional Rights*, 17 J. GENDER, RACE & JUST. 467 (2014).

¹⁶ See CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 1 (2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_inte_rest.pdf [perma.cc/B3XZ-ZKCV] ("[When a court makes a] decision[] that affect[s] children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights . . . [the court] must weigh whether its decision will be in the 'best interests' of the child.").

¹⁷ See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 283 (2006).

that are constitutionally recognized. Professor Susan Frelich Appleton noted that “the [U.S. Supreme] Court has ‘recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children,’” leading to her conclusion that “[t]he Supreme Court has reaffirmed the primacy of parental rights under the Due Process Clause.”¹⁸ Other scholars note,

Going back to the 1920s in cases like *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, the Supreme Court has held that parents have a fundamental constitutional right to raise their children without state interference. Custody orders, public school policies, or other state action that sharply limit the child-rearing role of either parent, the argument goes, substantially burden that right, triggering strict judicial scrutiny. And, under strict scrutiny, the state must show some “compelling interest”—such as imminent harm to the child—to justify its intervention. Incantation of more amorphous interests, including the “best interests” of children, is insufficient.¹⁹

Yet, the best interests of the child are frequently considered in state actions such as custody orders that could be viewed as limiting the role of a parent. Custody orders are commonplace. When there are multiple parents, they must *share* their parental rights and responsibilities, and the recognition of a second or third parent does not upset the constitutional balance between parental rights and the best interests of the child. The child has a right to maintain emotional bonds with multiple legally-recognized parents, and it is generally in the child’s best interest to do so.

Parentage *in praxi* draws its origins from de facto parentage, which will be explained in the Introduction of this article. Part I discusses the “best interests of the child” standard and the role of a parent. Part II conducts an in-depth analysis of statutory and doctrinal de facto parentage (the doctrine upon which parentage *in praxi* is based) and other doctrines that recognize individuals’ functional parental roles, including the Uniform Parentage Act, *in loco parentis*, psychological parentage, and visitation. Throughout Part II, the theory of parentage *in praxi* is expanded, and it is compared to existing legal doctrines for the preservation of third parties’ rights. This comparison also highlights some of the drawbacks of parentage *in praxi* and other doctrines, then builds upon these drawbacks. Part IV briefly explores the possibility of children actually having three genetic parents, made possible by scientific techniques pending approval in the United States and recently approved human subject trials in the United Kingdom.

¹⁸ See Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1488 (2014) (citing to the plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

¹⁹ See David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1474–75 (2006).

A. *Introduction to the Legal Approach Underlying Parentage in Praxi: De Facto Parentage*

A “functional approach” to parentage recognizes individuals who are not currently legal parents but undertake parental actions in a child’s life.²⁰ There are a number of terms in use for individuals who occupy a significant parent-like role in a child’s life. These terms include “de facto parents, parents by estoppel, psychological parents, intent-based parenthood, and *in loco parentis* status”; these terms have different meanings in different jurisdictions.²¹

When this article refers to de facto parentage, it means de facto parentage as defined by the American Law Institute (ALI), unless otherwise explained.²² This definition is very similar to the definition of de facto parentage in the statutory jurisdictions that this article focuses on: Delaware and Washington, D.C.²³ The ALI defines a de facto parent as

- an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,
- (i) lived with the child and,
 - (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,
 - (A) regularly performed a majority of the caretaking functions for the child, or
 - (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.²⁴

While I agree with the substantive definition offered by the American Law Institute and use it as the basis for parentage *in praxi*, I object to its operation. Under the ALI definition, de facto parents and parents by estoppel do not have the same rights as legal parents.²⁵ Thus, in jurisdictions with de facto parentage

²⁰ See Appleton, *supra* note 18, at 1486.

²¹ *Id.* at 1486–87. For an overview of state court cases’ treatment of various functional parents, see Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1180–89 (2010) (specifically, Appendix D, which contains a chart).

²² PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. L. INST. 2002).

²³ This article also focuses on California not due to a de facto parentage statute as de facto parents in California are not parents but due to recent revisions to the California Code which allow a child to have more than two parents, which is the same effect that de facto parentage statutes in Washington, D.C. and Delaware allow.

²⁴ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. L. INST. 2002).

²⁵ See Appleton, *supra* note 17, at 272

More recently, the American Law Institute’s *Principles of the Law of Family Dissolution: Analysis and Recommendations* adopted a functional approach by proposing recognition of “parents by estoppel” and “de facto parents,” labels that attach based on the acceptance of parental responsibility, shared residence, and reliance. Although the *Principles* prescribe that parents by estoppel have “all of the privileges of a legal parent,” such parity arises in a limited context – the allocation of custodial and decision-making responsibility in the wake of family dissolution.

that parallels ALI's definition, "[s]ome courts have concluded that under the common law, de facto parentage does not confer standing to petition for custody or visitation of a minor child."²⁶ In such instances, de facto parents are functionally parents but they are not parents under the law.

B. "Non-conventional settings": The Problems that Parentage in Praxi Addresses

Children suffer many disadvantages without parentage *in praxi*. Economically, not having access to parentage *in praxi* negatively impacts the child by depriving the child of important benefits, such as "social security or workers compensation benefits in the event of the death or disability of the adult" or the health insurance benefits that certain employers only offer to their employees' legal children.²⁷ Children whose putative parents are not recognized as legal parents may lose access to care, as a person may not be entitled to family leave to care for children for whom they are not legally recognized as parents.²⁸ Further, "[a]ccess to . . . tax deductions and potentially even citizenship can also hinge on these legal relationships [between a parent and child]."²⁹ More centrally, as noted above, without the recognition of their putative parents as legal parents, children lose access to "visitation should the couple separate, and, most important, the right of a surviving parent to have automatic guardianship in case of the death or disability of the other."³⁰ Children who lack recognition of their putative parents as legal parents miss out on all of the "rights and protections . . . guaranteed to children born to married parents, born to one parent and adopted by a stepparent, or adopted by married couples."³¹

The following four scenarios offer insight into how parentage *in praxi* would operate, in comparison to other doctrines.

De facto parents have an even more explicitly "second-class status," while still acquiring some rights to seek custody and visitation. In the allocation of responsibility for children, the *Principles* explicitly accord priority to legal parents and parents by estoppel. For "de facto parentage" to arise, the legal parent must have consented to another's acting as a primary parent or must have completely failed to perform a caregiving role.

Id. (citations omitted).

²⁶ See *Smith v. Guest*, 16 A.3d 920, 932 (Del. 2011) (citing *Jones v. Barlow*, 154 P.3d 808 (Utah 2007); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008)); see also Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 696 (2005).

²⁷ Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 590–91 (2009).

²⁸ Adam Pertman & Jeanne Howard, *Emerging Diversity in Family Life: Adoption by Gay and Lesbian Parents*, in *ADOPTION BY LESBIANS AND GAY MEN: A NEW DIMENSION IN FAMILY DIVERSITY* 20, 23 (David M. Brodzinsky & Adam Pertman eds., 2012).

²⁹ Ian Lovett, *Measure Opens Door to Three Parents, or Four*, N.Y. TIMES (July 13, 2012), http://www.nytimes.com/2012/07/14/us/a-california-bill-would-legalize-third-and-fourth-parent-adoptions.html?pagewanted=all&_r=0 [perma.cc/Q3NE-XMYL].

³⁰ Pertman & Howard, *supra* note 28.

³¹ *Id.*

Scenario one: An unmarried couple, Woman A and Woman B, decide to have a child using the sperm of a friend (Man C) who intends to help raise the child as well. Woman A's egg is inseminated in a lab with Man C's sperm and implanted into Woman B.³²

Under prevailing law, Woman B would be deemed the legal mother of the child (as the "biological" mother), even though Woman A is the genetic mother.³³ Man C would be the child's father if the father was named at birth. In certain jurisdictions, Woman A and Woman B would both be the child's parents from birth, if Woman A and Woman B were married. However, if Woman A and Woman B were unmarried, Woman A would have to obtain judicial recognition of parentage if the requirements of *de facto* parentage were fulfilled.³⁴

If Woman A and Woman B ended the relationship before Woman A was recognized as a legal parent, the child could be deprived of access to Woman A, even if the child saw both of Woman A and Woman B as his or her parents and called them both variations of "mom."³⁵

In a jurisdiction with parentage *in praxi*, Woman A could petition the court for legal parentage in accordance with the parentage *in praxi* statute.³⁶ Without a form of parentage *in praxi*, it is likely that Woman A could not be a legal parent or if she could that she would have to replace Man C. In a jurisdiction with parentage *in praxi*, all three individuals could be parents.

Scenario two: Woman C is married to Husband G and has an affair with Man M. Daughter V is born.³⁷

Under prevailing law, Daughter V is the child of the marriage; her parents are Woman C and Husband G. With genetic testing, Husband G can rebut the marital presumption, which presumes that a husband is the legal father of a child born into the marriage—but Man M does not have the right to do so. Man M therefore cannot be a parent of the child.

In a jurisdiction with parentage *in praxi*, if a relationship has developed between Daughter V and Man M, then Man M can petition for legal parentage.

³² See, e.g., *Treatment Options for Same-Sex Couples*, YALE FERTILITY CTR., http://medicine.yale.edu/obgyn/yfc/ourservices/fertility/egg_donation/same-sex_couples.aspx [perma.cc/PXZ8-W2QV] (last visited Feb. 1, 2016) ("Some same sex female couples choose to have both partners involved, one to provide the eggs and the other the uterus.").

³³ See, e.g., Polikoff, *supra* note 14, at 208, 215; see also Clare Huntington, *Obergefell's Conservatism: Reifying Family Fronts*, 84 *FORDHAM L. REV.* 23 (2015) (discussing the legal treatment of nonmarital families after the U.S. Supreme Court's decision in *Obergefell v. Hodges*).

³⁴ See Polikoff, *supra* note 14, at 215–25.

³⁵ See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 889 (Mass. 1999) ("The child calls the plaintiff 'Mommy' and the defendant 'Mama.' He tells people that he has two mothers.").

³⁶ Parentage *in praxi* operates in a manner legally similar to that of *de facto* parentage. See, e.g., *J.W.S., Jr. v. E.M.S.*, Nos. CS11-01557, CS13-01083, 2013 WL 6174814, at *4–6 (Del. Fam. Ct. May 29, 2013) (and the corresponding discussion *infra*).

³⁷ This fact pattern is based on the 1988 U.S. Supreme Court case, *Michael H. v. Gerald D.* 491 U.S. at 114. As will be discussed *infra*, the limitations of California law in the recognition of multi-parent families were not corrected until 2013.

Scenario three: This scenario comes from a *New York Times* article:

In Portland, Ore., Sean Kane adopted his wife's two children from her first marriage. But because they maintained close ties with their biological father, who now lives in California, Mr. Kane did not want the court to sever that legal relationship. Instead he pursued a third-parent adoption, which was finalized last year.³⁸

Under third-parent adoption, the child can have three parents: the child's two "natural" (presumably biological) parents and the new third parent.³⁹ However, such an option is not available in all states. In most states, stepparents can only adopt stepchildren if one of the stepchildren's natural parents' parental rights have been terminated.⁴⁰

In a jurisdiction without a third-parent adoption statute that specifically permits a child to have more than two parents, parentage *in praxi* would focus on the relationship between the "new third stepparent" and the child. While that relationship would depend on a legal parent having allowed the third parent to operate "in the shoes" of a parent, it would not depend on the existence of a legal relationship between the child's legal parent and the child's putative parent.⁴¹

Scenario four: Two widowers, a man and a woman, marry. The widowed wife has children from her first marriage. The husband never formally adopts the children; however, he acts as a father to the children (e.g., provides financial support and offers guidance), but the children do not call their stepfather their father. The widowed individuals divorce.

Should the now recently divorced husband be legally responsible for those children? This answer is not as easy to determine. It is possible that in jurisdiction with parentage *in praxi*, the widowed husband would be considered a parent, even though he occupied the role of a stepparent as opposed to a parent to the children; however, as will be explored later, stepparent roles are more difficult to define. For example, stepparents are often called by different names that are not variations on "mom" or "dad," especially by children whose parents remarried later in their childhood. It is possible that the children would not deem those stepparents to be their putative parents, despite the parents' roles.

Divorce and other family breakups are difficult for children. "When couples divorce, the biggest victims of the breakup are often the children, who lose

³⁸ Lovett, *supra* note 29; see also OR. REV. STAT. ANN. § 109.041(2) (West 2003) (addressing the "[r]elationship of adopted child to natural and adoptive parents").

³⁹ See, e.g., Lovett, *supra* note 29.

⁴⁰ See, e.g., Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 85–86 (2006).

⁴¹ Parentage *in praxi* requires that a parent *in praxi* "stand in the shoes" of a parent. This term comes from New Jersey case law on the rights of third parties. See, e.g., V.C. v. M.J.B., 748 A.2d 539, 545 (N.J. 2000); see also V.C. v. M.J.B., 725 A.2d 13, 20 (N.J. Super. App. Div. 1999).

the daily support and encouragement of a parent they've grown to love and trust. Non-custodial parents can experience similar feelings of loss, confusion and anger over the failure of a relationship."⁴² As such, legal provisions are needed to preserve the relationships between children and their putative parents.

C. Parentage Overview

Black's Law Dictionary defines a "parent" as:

The lawful father or mother of someone. In ordinary usage, the term denotes more than responsibility for conception and birth. The term commonly includes (1) either the natural father or the natural mother of a child [although "natural" does not equate with genetic or biological as discussed *infra*], (2) either the adoptive father or adoptive mother of a child, (3) a child's putative blood parent who has expressly acknowledged paternity, and (4) an individual or agency whose status as guardian has been established by judicial decree.⁴³

A more thorough definition of "parent" would recognize that being a parent encompasses both rights and responsibilities. One of those responsibilities is custody. The term custody has two components: (1) legal custody, which is the "right and responsibility to make decisions for a child"; and (2) residential or physical custody.⁴⁴ Additionally, parents are required to "contribute to the economic maintenance and education of a child until the age of majority, the child's emancipation before reaching majority, or the child's completion of secondary education. The obligation is enforceable both civilly and criminally."⁴⁵ This "economic maintenance . . . of a child" includes basic expenses (e.g., clothing and food) and other provisions, such as health insurance.⁴⁶

I. BEST INTERESTS OF THE CHILD

The best interests of the child standard governs judicial decision-making related to parental obligations, such as "custody, visitation, and adoption."⁴⁷ Goldstein *et al.* note the vagueness of the term "best interests of the child": "Though everyone may agree that children ought not to be 'neglected' or

⁴² Editorial, 'De Facto Parenthood,' BALT. SUN (Feb. 26, 2015, 3:33 PM), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-defacto-parents-20150226-story.html> [perma.cc/8KLG-MQAA].

⁴³ *Parent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴⁴ *Frequently Asked Questions: Child Custody/Visitation*, N.Y. COURTHelp, <http://www.nycourts.gov/courthelp/faqs/childcustody.html> [https://web.archive.org/web/20130514083241/https://www.nycourts.gov/courthelp/faqs/childcustody.html] [perma.cc/9S JL-EKQK] (last updated Feb. 26, 2013).

⁴⁵ *Child Support*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴⁶ See *OCSE Fact Sheet*, OFF. OF CHILD SUPPORT ENF'T, <http://www.acf.hhs.gov/programs/css/resource/ocse-fact-sheet> [perma.cc/LB33-TLUF] (last visited Feb. 1, 2016).

⁴⁷ Tanya Washington, *In Windsor's Wake: Section 2 of DOMA's Defense of Marriage at the Expense of Children*, 48 IND. L. REV. 1, 33 (2014).

'abused' or that their 'best interests' should be served, there is little agreement about the meaning of these terms."⁴⁸ All states and the District of Columbia "have statutes requiring that the child's best interests be considered whenever specified types of decisions are made regarding a child's custody, placement, or other critical life issues."⁴⁹ The statutes of "[a]pproximately 21 States and the District of Columbia list . . . specific factors for courts to consider in making determinations regarding the best interests of the child"⁵⁰ with the most frequently listed statutory factor being "[t]he emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers."⁵¹

One factor that is in the best interests of the child is permanency, which "provides the stability, security, and family structure necessary for the healthy development of a child."⁵² By analogy, the concerns that mandate maintaining a child's relationship with their non-custodial (legal) parent in a two-parent context should apply to the maintenance of the relationship between children and putative parents. Therefore, without efforts by legal parents to "nurture the relationship between the non-custodial parent [or putative parent] and the child, a child may feel loss and even abandonment."⁵³ Children have an interest in a preserved relationship with their putative parents. Visitation with their parents is in the best interests of the child. Frequent contact with a nonresidential parent is linked to "better health for older teens and young adults from disrupted families."⁵⁴ Additionally, "most children want to maintain relationships with both parents."⁵⁵ Recognition of an individual as a full legal parent provides a legal framework for the maintenance of that putative parent-child relationship. Without it, a child can be denied access to his or her putative parents, which can be detrimental to the child's well-being and the best interests of the child. The best

⁴⁸ JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 16 (1979).

⁴⁹ CHILD WELFARE INFO. GATEWAY, *supra* note 16.

⁵⁰ *Id.* at 3. ("Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nevada, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin.").

⁵¹ *Id.* (The following fifteen states and the District of Columbia list this factor: "Connecticut, Delaware, Florida, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, North Dakota, Ohio, Oregon, Tennessee, Vermont, and Virginia.").

⁵² *Once Born, Twice Orphaned*, *supra* note 15.

⁵³ D. WAYNE MATTHEWS, N.C. COOP. EXTENSION SERV., LONG-TERM EFFECTS OF DIVORCE ON CHILDREN (1998), <http://www.ces.ncsu.edu/depts/fcs/pdfs/fcs482.pdf> [perma.cc/Q2GY-LUDR].

⁵⁴ CHRISTINE WINQUIST NORD & NICHOLAS ZILL, WESTAT, INC., NON-CUSTODIAL PARENTS' PARTICIPATION IN THEIR CHILDREN'S LIVES: EVIDENCE FROM THE SURVEY OF INCOME AND PROGRAM PARTICIPATION (1996), <http://fatherhood.hhs.gov/SIPP/NONCUSP1.HTM> [<https://web.archive.org/web/20130519051404/http://fatherhood.hhs.gov/SIPP/NONCUSP1.HTM>] [perma.cc/4NDB-CP64].

⁵⁵ Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 420 (2008) (internal citations omitted).

interests of the child are independent of the relationship between the child's parents (putative and legal) because

familial bonds need not depend upon the technicality of the biological or legal relationship between a child and an adult. Where longtime foster parents, for example, return a child's affection and make him feel wanted, "looked after," and appreciated, crucial bonds usually form between them which cannot be disturbed without harm.⁵⁶

Thus, the recognition of parentage gives legal protections to the putative parent-child relationship as seen from the eyes of the child.

Parentage *in praxi* furthers the best interests of the child by preserving the child's financial support (or ensuring its imposition when an individual has been acting as a parent) and preserving familial ties from the perspective of the child. For example, various studies have noted the disadvantage of single-parent households. As one scholar notes, citing research on the impacts of single parents on families, "about half of the disadvantage children of single parents experience is due to economic factors: single-parent homes have less money than two-parent homes."⁵⁷ Of course, the requirement to pay child support attempts to make up for this loss of economic resources by ensuring that the child has access to two income sources. By this measure, having three parents could be better than having two parents because a child would have a third source of income.

As will be detailed in the section discussing California's recent statute allowing for more than two parents, when a child under such a statutory regime has three parents, these parents share in the support of the child. In California, when more than two legal parents exist, "[t]he court sets the amount of child support based on both [meaning "each"] party's income and the percentage of time the child is in each parties' care. The court may also order additional child support such as medical support, daycare expense, and other add-ons."⁵⁸ Even though a child would presumably spend less time with a third noncustodial parent not living in the same household, a child would have access to more support sources.

II. COMPARING PARENTAGE *IN PRAXI* TO OTHER DOCTRINES THAT RECOGNIZE PUTATIVE PARENTS

Parentage *in praxi* is a doctrine that recognizes putative parents as legal parents, drawing upon existing legal methods of recognizing individuals who

⁵⁶ GOLDSTEIN ET AL., *supra* note 48, at 40.

⁵⁷ Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 684 (2008).

⁵⁸ See CAL. DEP'T OF CHILD SUPPORT SERVS., CHILD SUPPORT HANDBOOK 10 (2012), http://www.childsup.ca.gov/Portals/0/resources/docs/pub160_english.pdf [perma.cc/UE3P-T CGV]. While the Child Support Handbook mentions "both party's" income, the statute provides that the number of parties can be greater than two, so "both" should mean "each." See *id.*

act as parents. The theory incorporates aspects of these other methods that have effectively recognized some of the parental rights of third parties into one theoretical doctrine that can be used for the many types of nontraditional families that are becoming more common. Parentage *in praxi* offers a more comprehensive approach, where other doctrines for recognizing putative parents, as explored below, only offer some of the benefits of parentage (e.g., visitation).

A. *De Facto Parentage—Statutory and Doctrinal*

Parentage *in praxi* would recognize de facto parents as full legal parents in the same way that the law recognizes a “natural” mother or father. In order to be a de facto parent or a parent *in praxi* and thus gain the same rights and responsibilities as natural parents, one must fulfill certain criteria. The application of the parentage *in praxi* “test” would be very similar to that imposed for de facto parentage.

Consent is generally a requirement of de facto parentage, and certain state courts have emphasized both the importance of consent requirements and the inability of a third parent to “swoop in” and become a parent without a legal parent’s consent.⁵⁹ Consent protects the “fundamental right” of parents from the unwanted intrusion of third parties into decisions on how to parent their children.⁶⁰ The status of a parent *in praxi* can only be obtained with the consent of one of the original parents. Presumably, it would be difficult, in the case of a child with two original parents, to have both original parents consent to a third individual in the “shoes” of a parent. Consent is a key concept when analyzing whether a parent *in praxi* could *infringe* on an existing legal parent’s rights. An original parent who allows another individual to “stand in the place” of a legal parent consents to any perceived “loss” of their fundamental rights. Those individuals whose actions fail to stand in the place of the natural parent are allowed to pursue visitation and not the decision-making authority that a legal parent would have.⁶¹ Because one must stand in the place of the natural parent, merely

⁵⁹ See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. L. INST. 2002); see also *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004). See, e.g., *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999) (“The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent.”).

⁶⁰ See Appleton, *supra* note 18, at 1488 n.220 (“the [U.S. Supreme] Court has ‘recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.’” (quoting the plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 66 (2000))).

⁶¹ See *Mullins v. Picklesimer*, 317 S.W.3d 569, 574 (Ky. 2010)

It has been held that parenting the child alongside the natural parent does not meet the de facto custodian standard in KRS 403.270(1)(a). Rather, the nonparent must “literally stand in the place of the natural parent.” *Id.* Although Mullins was providing care and financial support for Zachary, it was undisputed that Mullins did not have de facto custody status regarding Zachary because she was co-parenting the child with Picklesimer. Picklesimer maintains that once the court determined Mullins was not a de facto custodian, Mullins no longer had standing to pursue custody on any other grounds. We disagree.

parenting *alongside* a legal parent or “helping out” is insufficient for the establishment of de facto parent status.⁶²

Additionally, de facto parents and parents *in praxi* must undertake their role “for reasons primarily other than financial compensation,” which removes paid caretakers such as babysitters and nannies from the category of individuals eligible to become de facto parents.⁶³ Intent, while not specifically mentioned in the ALI definition of de facto parentage, does appear in judicial analysis of de facto parentage. Another factor that courts often consider is whether the parent seeking de facto status was “part of the decision to create a family by bringing the child into the world.”⁶⁴

Caretaking functions over a specified amount of time are the underpinning of de facto parentage. Caretaking functions, however, are easier to define when younger children are involved. For example, under the ALI definition of de facto parentage, “caretaking functions” include the following non-exhaustive list: “grooming, washing, dressing, toilet training, playing with child, bedtime and wake-up, satisfying nutrition needs, protecting child’s safety, providing transportation, directing development, discipline, arranging for education, helping to develop relations, arranging for health care, providing moral guidance, and arranging alternate care for the child.”⁶⁵ Furthermore, these are all actions that extended family, or even a friend who would be “helping out,” would undertake—although the proportion of time that extended family or friends expend for these tasks would likely vary. The ease of an individual undertaking such caretaking functions thus operates in conjunction with the requirement that a de facto parent (or parent *in praxis*) stand in the shoes of a parent financially and emotionally.

This article advocates for a parentage form different from de facto parentage. This is in part because “the [ALI] Principles do not impose a duty of child support on de facto parents, even as the Principles confer rights on former live-in partners who meet its three-pronged test for de facto parenthood.”⁶⁶ As legal parents are required to support their children financially, those who are granted parentage *in praxi* status must, as a condition of meeting that standard, have

Id. (citations omitted).

⁶² *Id.*

⁶³ See, e.g., *E.N.O.*, 711 N.E.2d at 891 n.6 (“The de facto parent fulfils [sic] this role ‘for reasons primarily other than financial compensation.’ See ALI Principles of the Law of Family Dissolution § 2.03(1)(b) (Tent. Draft No. 3 Part I 1998) (adopted at annual meeting May, 1998). Thus, we do not recognize as a de facto parent a babysitter or other paid caretaker. Even though these caretakers may grow to feel genuine affection for their charges, their caretaking arrangements arose for financial reasons.”).

⁶⁴ *Id.* (citing to *C.M. v. P.R.*, 649 N.E.2d 154 (1995)).

⁶⁵ See Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1112 (citing to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.03(5)(a)–(h), at 118–19 (AM. L. INST. (2002) (setting forth a non-exclusive list)).

⁶⁶ See *id.* at 1131.

provided financial support during the requisite time period before they are deemed a legal parent in the same way that another parent would. Thus, someone who petitions to become a parent *in praxi* would be responsible for child support just as an “original” parent would be. To borrow the words of a bill previously introduced in the Maryland state legislature, a parent *in praxi* “shall have all the duties, rights, and obligations of a parent of the child.”⁶⁷

Parentage *in praxi* can be recognized either doctrinally or statutorily, although statutory recognition is preferable. Some states, including “Maine, New Jersey, Pennsylvania and Washington have court rulings in which someone with no biological or adoptive relationship to a child can still be a full legal parent if a judge finds that the adult has functioned as a parent and has contributed substantially to the child’s life.”⁶⁸ For example, in 2004, the Supreme Judicial Court of Maine stated that it had “recognized de facto parental rights or similar concepts in addressing rights of third parties who have played an unusual and significant parent-like role in a child’s life in several opinions over the last sixty years.”⁶⁹ However, in that same decision, the Court declined to expressly define the standard for determining de facto parenthood, demonstrating the uncertainty that comes with reliance on judicial decisions rather than statutes.⁷⁰ This 2004 Maine opinion left open the possibility that the ultimate definition of what legally makes a parent would be “fleshed out by the Legislature . . . in the future.”⁷¹ But, in the meantime, individuals in the jurisdiction would be unable to predictably plan how to translate being a putative parent into being a legal parent.⁷² Similarly, Washington D.C., which has statutory de facto parentage provisions that are discussed *infra*, had no standard definition for what de facto parentage was prior to 2007.⁷³ The unpredictability of doctrinal de facto parentage—the source of which may come from equity or a judge’s interpretation of the best interests of the child standard—in addition to the uncertainty

⁶⁷ See H.B. 577, 432nd Gen. Assemb., Reg. Sess. (Md. 2015) <http://mgaleg.maryland.gov/2015RS/bills/hb/hb0577f.pdf> [perma.cc/RD2F-PJH4] (last visited March 4, 2015).

⁶⁸ See MOVEMENT ADVANCEMENT PROJECT ET AL., ALL CHILDREN MATTER: HOW LEGAL AND SOCIAL INEQUALITIES HURT LGBT FAMILIES 47, (2011) <http://www.lgbtmap.org/file/all-children-matter-full-report.pdf> [perma.cc/U4AZ-CW2H] (internal citation omitted).

⁶⁹ C.E.W. v. D.E.W., 845 A.2d 1146, 1149 (Me. 2004).

⁷⁰ *Id.* at 1152.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *Fields v. Mayo*, 982 A.2d 809, 813 n.4 (D.C. 2009)

A few of our pre-2007 cases use the term ‘de facto parent(s)’ but without explication of the concept. See *Simms v. United States*, 867 A.2d 200, 206 (D.C. 2005); *In re P.S.*, 797 A.2d 1219, 1224 (D.C. 2001); *In re L.W.*, 613 A.2d 350, 354 (D.C. 1992). The term has been used and explained in other jurisdictions. See *Philbrook v. Theriault*, 957 A.2d 74, 78–80 (Me. 2008) (grandparents failed to establish that they were de facto parents); *In re Parentage of L.B.*, 155 Wash. 2d 679, 122 P.3d 161, 165 (2005) (case remanded to determine whether a female partner enjoyed the status of de facto parent); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052, 1061 n. 15 (2002) (defining de facto parent).

Id.

that may result from allowing individual judges to interpret fairness, is that in some states, equity is not available.⁷⁴ In other words, in certain jurisdictions such as California, Florida, and New York, the legislature has specifically limited the equitable discretion of judges in family law matters.⁷⁵

Because statutes offer the benefits of predictability and uniformity, parentage *in praxi* should preferably be incorporated statutorily as opposed to doctrinally. The de facto parent statutes discussed in this section are also the foundation for parentage *in praxi*. Both Washington, D.C. and Delaware provide statutory tests for de facto parentage. The California statute discussed in this section amended the California code to specifically allow for more than two parents in custody and child support determinations. Parentage *in praxi* would combine these two types of statutes in order to make clear that (1) a putative parent currently not recognized by the law can become a legal parent and (2) a child can have more than two parents. Other states have statutes allowing putative parents to seek custody of children, but those statutes do not specifically outline what test is involved.⁷⁶ Parentage *in praxi* provides that clarity.

1. Delaware

Delaware statutorily provides for de facto parentage under 13 Del. C. § 8-201 (“Establishment of parent child relationship”), which provides:

(c) De facto parent status is established if the Family Court determines that the de facto parent:

- (1) Has had the support and consent of the child’s parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;
- (2) Has exercised parental responsibility for the child . . .

⁷⁴ See *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 893 n.11 (Mass. 1999)

Jurisdictions that have reached the opposite result [on de facto parentage] differ from ours because their statutory law supplants the equitable powers of their courts. See, e.g., *West v. Superior Court*, 59 Cal. App. 4th 302, 309, 69 Cal. Rptr. 2d 160 (1997) (court lacked jurisdiction to enter order granting visitation rights to former partner because statutory law occupies field of child visitation); *Music v. Rachford*, 654 So. 2d 1234 (Fla. Dist. Ct. App. 1995) (per curiam) (visitation rights with regard to nonparent solely statutory); *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 656, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991) (same-sex partner not parent within meaning of domestic relations statute). But see *Lynda A.H. v. Diane T.O.*, 243 A.D. 2d 24, 27, 673 N.Y.S.2d 989 (1998) (same-sex partner denied visitation because it impermissibly impaired biological mother’s right to custody and control of child).

Id.

⁷⁵ *Id.*

⁷⁶ See Courtney G. Joslin, *supra* note 14 (Those states are Washington, D.C., “Hawaii, Indiana, Minnesota, Montana, Oregon, and Texas . . . That is, in these states, people who have functioned as a parent to a child are statutorily entitled to seek custody even though they are not the legal parents of the child.”) (citations omitted).

(3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.⁷⁷

The Delaware de facto parentage statute expands the category of individuals entitled to be legal parents and therefore expands the category of individuals entitled to petition for custody of a child.⁷⁸

In an unpublished opinion, a Delaware family court adjudicated a situation very similar to that of *Michael H. v. Gerald D.* (the basis for Scenario 2 in this article).⁷⁹ In *Michael H. v. Gerald D.*, the child of the marriage, Victoria D., was biologically and genetically related to her mother, Carole D., but she was not genetically related to her father, Gerald D.⁸⁰ While Gerald D. was “listed as [her] father on her birth certificate and always held Victoria out to the world as his daughter,” Victoria D.’s biologically father was actually Michael H.⁸¹ As she grew older, Victoria D. “found herself within a variety of quasi-family units”; these family units always included Carole D., but the existence of Michael H. and Gerald D. within these units varied as Carole D. traveled and lived with other men, including Michael H. (who held Victoria out as his own once he discovered that Victoria was his daughter), Gerald D., and another man, Scott K.⁸² Justice Scalia “hoped” in 1989 that these facts were “extraordinary” before holding that Michael H. did not have a right to rebut the marital presumption (of Gerald D.’s parentage).⁸³

In contrast, a Delaware family court case addressing a similar situation in 2013 found that a child in a similar situation, a child called “M.,” should have three parents instead of two.⁸⁴ In *J.W.S., Jr. v. E.M.S.*, J.W.S. (who married E.M.S. after E.M.S. became pregnant) was the presumed father of a child whom he had considered his own since the child’s birth, even though J.W.S. was not listed on the child’s birth certificate. The child, M., had relationships with both J.W.S. and the genetic father, who was referred to in the opinion as D.⁸⁵ M. called each of the men “Dad.”⁸⁶ After D. rebutted the presumption that J.W.S. was the child’s father, J.W.S. was still eligible to be a de facto parent under Delaware law. In fact, the court found that J.W.S. met the requirements to be such a parent.⁸⁷ The court explained that “it is appropriate to give legal

⁷⁷ 13 DEL. C. § 8-201(c) (2013); see also MOVEMENT ADVANCEMENT PROJECT ET AL., *supra* note 68 at 41–2.

⁷⁸ See *Smith v. Guest*, 16 A.3d 920, 928 (Del. 2011).

⁷⁹ See generally *J.W.S., Jr. v. E.M.S.*, Nos. CS11-01557, CS13-01083, 2013 WL 6174814 (Del. Fam. Ct. May 29, 2013).

⁸⁰ 491 U.S. 110, 114 (1989).

⁸¹ *Id.* at 113–14.

⁸² *Id.* at 114.

⁸³ *Id.* at 113, 131–32.

⁸⁴ See *J.W.S., Jr.*, 2013 WL 6174814, at *1.

⁸⁵ *Id.* at *1, *3.

⁸⁶ *Id.* at *3.

⁸⁷ *Id.* at *4–5.

parental status to three people in this case: [E.M.S.] as the biological mother, D. as the adjudicated biological father, and [J.W.S.] as a de facto parent.”⁸⁸ This was not the first time that a Delaware family court judge established a family with three legal parents; it had done so as early as 2012.⁸⁹

2. *Washington, D.C.*

Washington, D.C. also statutorily provides for de facto parentage as of 2007.⁹⁰ In Washington, D.C.:

(1) “De facto parent” means an individual:

(A) Who:

- (i) Lived with the child in the same household at the time of the child’s birth or adoption by the child’s parent;
- (ii) Has taken on full and permanent responsibilities as the child’s parent; and
- (iii) Has held himself or herself out as the child’s parent with the agreement of the child’s parent or, if there are 2 parents, both parents; or

(B) Who:

- (i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
- (ii) Has formed a strong emotional bond with the child with the encouragement and intent of the child’s parent that a parent-child relationship form between the child and the third party;
- (iii) Has taken on full and permanent responsibilities as the child’s parent; and
- (iv) Has held himself or herself out as the child’s parent with the agreement of the child’s parent, or if there are 2 parents, both parents.⁹¹

Parentage *in praxi* would adopt the Washington, D.C. requirement that consent be obtained from both parents (if the child did indeed have two legally recognized parents). This deference to the original parents would allay some critics’ concerns about other individuals “swooping in” to infringe upon parental rights—although it could very well make parentage *in praxi* more contentious. It is easy to envision a scorned former spouse (and original parent) objecting to the addition of his or her previous spouse’s new partner, who has “taken” his or

⁸⁸ *Id.* at *5.

⁸⁹ See *A.L. v. D.L.*, Nos. CK12-01390, CK 08-01673, 2012 WL 6765564, at *3 (Del. Fam. Ct. Sept. 19, 2012) (“Finding that Father is J’s de facto parent puts this family in the unique situation of a child having three legal parents.”).

⁹⁰ See D.C. CODE § 16-831.01 (2013); see also *Fields v. Mayo*, 982 A.2d 809, 813 (D.C. 2009) (“Under D.C. Law 17-21, the District of Columbia Safe and Stable Homes for Children Act of 2007, which became effective on September 20, 2007, after the trial court issued its March 2, 2006 findings and conclusions in this case, the District’s legislature provided that a de facto parent “shall be deemed a parent” for the purpose of determining the legal and physical custody of a child.”).

⁹¹ D.C. CODE § 16-831.01(1).

her place as a legal parent. Still, it may be in the best interests of the child to have another individual to serve as a “check” on the imposition of a new parent on a child. Judges make decisions based only on the evidence offered to them, so it is better that there be multiple perspectives and sources of that evidence. If, after petitioning multiple times—and being denied due to another parent’s opposition—a putative parent has showed that he or she has completed the requirements of becoming a parent *in praxi*, then the judge should consider whether visitation is available for that individual, without entirely disregarding the consent requirement.

In Washington, D.C., if an individual is classified as a de facto parent, that individual can petition for custody of the child under the third party custody statute.⁹² Under this statutory scheme, a de facto parent may be awarded custody.⁹³ At the same time, the child’s natural parents retain their parental rights and responsibilities.⁹⁴ Therefore, children with statutorily-recognized legal parents are entitled to financial support from *all* of their parents. This furthers the best interests of the child by ensuring children’s financial well-being and contributing to their emotional well-being by preserving parent-child relationships.

Some scholars would differentiate between legal parents when assigning responsibility. For example, Professor Melanie Jacobs

propose[s] that the primary parents who engage in the bulk of daily responsibility for the child—and often have the most benefit from the close contact—

⁹² See D.C. CODE § 16-831.02

Action for custody of a child by a third party:

(a)(1) A third party may file a complaint for custody of a child or a motion to intervene in any existing action involving custody of the child under any of the following circumstances:

(A) The parent who is or has been the primary caretaker of the child within the past 3 years consents to the complaint or motion for custody by the third party;

(B) The third party has:

(i) Lived in the same household as the child for at least 4 of the 6 months immediately preceding the filing of the complaint or motion for custody, or, if the child is under the age of 6 months, for at least half of the child’s life; and

(ii) Primarily assumed the duties and obligations for which a parent is legally responsible, including providing the child with food, clothing, shelter, education, financial support, and other care to meet the child’s needs; or

(C) The third party is living with the child and some exceptional circumstance exists such that relief under this chapter is necessary to prevent harm to the child; provided, that the complaint or motion shall specify in detail why the relief is necessary to prevent harm to the child.

(2) A third party who is employed by the child’s parent to provide child care duties for that child may not file, under this chapter, a complaint for custody of that child or intervene in any existing action under this chapter involving custody of that child.”).

Id.

⁹³ See *id.*; see also *Changes in Custody*, CHILD SUPPORT SERV. DIVISION, <http://cssd.d.c.gov/page/changes-custody> [perma.cc/32B7-5UU5] (last visited Feb. 1, 2016) (Washington, D.C. states that “[t]he third party legal custodian or de facto parent has the legal responsibility to make decisions regarding the child’s health, education and general welfare.”).

⁹⁴ See *Changes in Custody*, *supra* note 93.

should have greater rights and responsibility regarding the raising of the child than a third—or fourth—parent who contributes less, or no, financial support and less emotional support and has a more tenuous relationship with the child.⁹⁵

A statutory scheme that incorporated parentage *in praxi* would not create a hierarchy between parents. A child would have custodial and noncustodial parents, but the court would not engage in an effort to determine which of three parents should have the most rights and responsibilities; a parent is a parent. Similarly, child support guidelines would not differentiate between noncustodial parents in a hierarchical manner. All noncustodial parents would be subject to the same child support guidelines. A statutory scheme incorporating parentage *in praxi* would, however, differentiate between a legal parent and an extended family member or close friend. Thus, if an individual who would be identified as a “second or third legal parent” under another scholar’s theory did not function in the same manner as a legal parent, then that person would not be a parent *in praxi* and would not be entitled to parental rights and responsibilities.

3. California

Approximately twenty-four years after *Michael H. v. Gerald D.*, California governor Gerald Brown signed into law a bill on October 4, 2013, “allow[ing] children in California to have more than two legal parents.”⁹⁶ In *Michael H. v. Gerald D.*, the Supreme Court focused on the American historical practice of presuming that the parents of a child born during a marriage were the married couple and that an extramarital “natural father” did not have the constitutional right to rebut that presumption.⁹⁷ This decision meant that California was not constitutionally required to allow Victoria D. to have two fathers.⁹⁸ Over two decades after the Supreme Court’s ruling in *Michael H. v. Gerald D.*, California Senate Bill 274 was proposed in response to a California court case that specifically limited the number of parents a child could have to two.⁹⁹ The San Francisco-based author of Senate Bill 274 sought “to address the changes in family

⁹⁵ See Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 223 (2010).

⁹⁶ See Patrick McGreevy & Melanie Mason, *Brown Signs Bill to Allow Children More Than Two Legal Parents*, L.A. TIMES (Oct. 4, 2013, 9: 27 PM), <http://www.latimes.com/local/lame-brown-bills-parents-20131005,0,7226241.story> [perma.cc/7UWD-QJY9]; S.B. 274, Chapter 564 (Cal. 2013) (California Senate bill allowing more than two legal parents).

⁹⁷ See 491 U.S. 110, 113, 120–26 (1989).

⁹⁸ See *id.* at 130–31 (1989) (“This assertion merits little discussion, for, whatever the merits of the guardian ad litem’s belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country.”).

⁹⁹ See S.B. 274 (“The purpose of this bill is to abrogate *In re M.C.* (2011) 195 Cal. App. 4th 197 insofar as it held that where there are more than two people who have a claim to parentage under the Uniform Parentage Act, courts are prohibited from recognizing more than two of these people as the parents of a child, regardless of the circumstances.”).

structure in California, including situations in which same-sex couples have a child with an opposite-sex biological parent.”¹⁰⁰ The enacted bill operates in conjunction with the Uniform Parentage Act:

This bill does not change any of the requirements for establishing a claim to parentage under the Uniform Parentage Act. It only clarifies that where more than two people have claims to parentage, the court may, if it would otherwise be detrimental to the child, recognize that the child has more than two parents.¹⁰¹

Senate Bill No. 274, as enacted, makes several amendments to the existing California Family Code. For example, Section 3040 of Family Code was amended to provide that

[i]n cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child’s need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child¹⁰²

This California provision makes clear that the best interests of the child include maintaining contact with all of the child’s putative parents, even if that child has more than two parents. The bill also adds a section to the Family Code to instruct courts to, when a child has more than two parents, “divide child support obligations among the parents . . . based on income and amount of time spent with the child by each parent.”¹⁰³ It also amends Section 4057 of the Family Code, which addresses the amount of child support to be ordered for the child, to provide for the sharing of support obligations by all parents.¹⁰⁴ The California statute accomplishes some of the goals of parentage *in praxi* by removing the limitation that a child may not have more than two parents, but it is not a *de facto* parentage statute (meaning it does not incorporate the ALI definition) or a parentage *in praxi* statute. In fact, in California, a *de facto* parent is not a legal parent.¹⁰⁵ Nevertheless, this recent California statute showcases how a statute could be fashioned to support one of the goals of parentage *in praxi*: removing the ceiling on two parents.

¹⁰⁰ McGreevy & Mason, *supra* note 96.

¹⁰¹ S.B. 274.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See In re A.F.*, 173 Cal. Rptr. 3d 774, 780 (Cal. App. Dep’t Super. Ct. 2014).

De facto parents do not have the same substantive rights and preferences as parents or even legal guardians. De facto parents have no right to reunification services, visitation, custody, continued placement of the child, “or to any degree of independent control over the child’s destiny whatsoever.” De facto parent status “merely provides a way for the de facto parent to stay involved in the dependency process and provide information to the court.”

Id. (citations omitted).

B. Adoption

De facto parentage, like parentage *in praxi*, requires one to act as a child's parent for a requisite period of time, whereas adoption presumes one has the ability to do so.¹⁰⁶ Adoption substitutes parents who show an intention to act as parents for a child's natural parents.¹⁰⁷ Adoption is insufficient for achieving the goals of parentage *in praxi* because

[a]doption is by definition the legal transfer of parenthood from one to another parent or couple. This transfer normally operates to completely terminate parental rights and relations between the parent and child, including relations between the child and the terminated parent's kin, such as the child's siblings, grandparents, aunts, uncles, and cousins; in their stead, adoption creates a new set of family relationships through the adoptive parent or parents. In addition, because formal adoption was created before the rise of divorce, adoption statutes initially contemplated termination of the rights of any legal parent and complete transfer to an entirely new family.¹⁰⁸

With "classic" adoption, a three-parent family could not exist. Parentage *in praxi* allows for a more holistic view of a child's life than the limited historical viewpoint that restricts a child to two parents.

C. In Loco Parentis

In loco parentis is another doctrine that allows third parties to assert limited parental rights. The definition of *in loco parentis* in some states is similar to the definition of de facto parentage:

The term 'in loco parentis,' according to its generally accepted common law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties.¹⁰⁹

"[T]he common law doctrine of *in loco parentis* [affords] rights to nonparents where the exercise of those rights is in the best interests of the child."¹¹⁰

The doctrine of *in loco parentis* has had an important historical role in allowing recognition of parental rights for putative parents who had previously

¹⁰⁶ See Am. L. Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1 (2001); see also Jared C. Leuk, *The Best Interests of the Child in Adoption: An Article Review*, 11 J. CONTEMP. LEGAL ISSUES 607, 609 (2000) ("Regardless of the adoption method, the prospective parents must petition the court for adoption, at which time their fitness for adoption of the child is assessed.").

¹⁰⁷ See Marjorie Maguire Shultz, *supra* note 2, at 320.

¹⁰⁸ Annette R. Appell, *Legal Issues in Lesbian and Gay Adoption*, in ADOPTION BY LESBIANS AND GAY MEN: A NEW DIMENSION IN FAMILY DIVERSITY 36, 37 (David Brodzinsky & Adam Pertman eds., 2012).

¹⁰⁹ *Niewiadomski v. United States*, 159 F.2d 683, 686 (6th Cir. 1947); see also *Latham v. Schwerdtfeger*, 802 N.W.2d 66, 72 (Neb. 2011); *L.S.K. v. H.A.N.*, 813 A.2d 872, 876 (Pa. Super. Ct. 2002).

¹¹⁰ *Latham*, 802 N.W.2d at 72.

parented the child as a part of a same-sex relationship. This is because *in loco parentis* focused on the role of the parent and was not limited by the relationship between the former partners. Because the best interests of the child standard is “the polestar consideration” in child welfare decisions, this standard focuses on the relationship between a child and a putative parent rather than the relationship between that putative parent and his or her partner or the gender of that partner.¹¹¹ Therefore, in a state like Arkansas, which did not recognize same-sex marriage or grant domestic partnership rights prior to 2015, the right of a same-sex partner to assert *in loco parentis* was not diminished by state policy or law on same-sex relationships.¹¹²

Despite the emphasis on the role of the person *in loco parentis* as a caregiver of the child (like a legal parent would be), the application of this doctrine still focuses on the best interests of the child rather than the rights of the parent to a parent-child relationship.¹¹³ As such, many decisions regarding *in loco parentis* do not mention support obligations on the part of the person granted visitation rights.¹¹⁴ It is not in the best interests of the child to recognize the rights of legal parentage but not the responsibilities of that parentage. Parentage *in praxi* overcomes this shortcoming by only recognizing those putative parents who have acted as legal parents by fulfilling these responsibilities. Recognition of a parent *in praxi*—as opposed to as an individual who has stood *in loco parentis*—would result in the enforcement of both the legal rights and responsibilities of parentage.

D. Psychological Parentage

Psychological parentage is another doctrine that recognizes “children have a strong interest in maintaining the ties that connect them to adults who love and provide for them.”¹¹⁵ The doctrine of psychological parentage allows third parties who achieve parent status with the consent of a legal parent to retain their status even where a past partner may try to thwart their efforts.¹¹⁶ Psycho-

¹¹¹ *Bethany v. Jones*, 378 S.W.3d 731, 738 (Ark. 2011).

¹¹² *Id.* at 731. Georgia is also a state that had a same-sex marriage ban prior to the U.S. Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (holding that same-sex couples may exercise the fundamental right to marry in the United States). For analysis of the impacts of the Georgia same-sex marriage ban on the children of same-sex couples, see Tanya Washington, *supra* note 47, at 14–16.

¹¹³ *Bethany*, 378 S.W.3d at 738.

¹¹⁴ *See generally id.*; *In re E.L.M.C.*, 100 P.3d 546 (Colo. App. 2004).

¹¹⁵ *V.C. v. M.J.B.*, 748 A.2d 539, 550 (N.J. 2000).

¹¹⁶ *Id.* at 554 (“Once a third party has been determined to be a psychological parent to a child, under the previously described standards, he or she stands in parity with the legal parent. *Ibid.* Custody and visitation issues between them are to be determined on a best interests standard giving weight to the factors set forth in [New Jersey law].”).

logical parentage also has a longstanding role in the application of the best interests of the child standard.¹¹⁷ As one observer has noted,

[n]early every court granting same-sex couple adoptions privileged the best interests of the child standard and equated these interests with the psychological parent principle associated with that standard along with the recognition that it is often better for a child to have two legal parents rather than one. Most of the cases involved families that had been together for years during which time the second parents participated in child rearing, childcare, and financial support of the child.¹¹⁸

The term “psychological parenthood” is used interchangeably with “de facto parenthood” in certain states, such as New Jersey.¹¹⁹ In some states, the test for psychological parentage is similar to the definition of de facto parentage offered by the American Law Institute, Delaware, and Washington, D.C.:

(1) the legal parent consented to and fostered the nonparent’s formation and establishment of a parent-like relationship between the nonparent and the child; (2) the nonparent and the child lived together in the same household; (3) the nonparent assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation, and (4) the nonparent has established a parental role sufficient to create with the child a bonded, dependent relationship parental in nature.¹²⁰

In states without statutes mandating a test for psychological parentage, if the doctrinally applied test offers the same benefits as a de facto parent statute would, this is a significant step towards ensuring the best interests of the child. However, such tests are buried in case law, making statutes providing for de facto parentage much easier for the public to access and comply with. Parentage *in praxi* provides a solution by combining the benefits of de facto parentage under the ALI definition with the accessibility and predictability of statutory law.

E. Visitation

In states that do not recognize those who would be deemed parents *in praxi*, visitation offers a piece of what parenthood entails. Visitation is the least-preferred doctrine analyzed in this article because it does not confer deci-

¹¹⁷ See, e.g., *In re E.L.M.C.*, 100 P.3d at 559 (“The importance of a psychological parent to the child has long been considered in applying Colorado’s best interests of the child standard.”).

¹¹⁸ See Appell, *supra* note 108, at 47 (citations omitted).

¹¹⁹ See *V.C.*, 748 A.2d at 545 (although New Jersey prefers the use of the term “psychological parent” *Id.* at 546, n.3: “The terms psychological parent, *de facto* parent, and functional parent are used interchangeably in this opinion to reflect their use in the various cases, statutes, and articles cited. Psychological parent is the preferred term.”).

¹²⁰ See, e.g., *In re E.L.M.C.*, 100 P.3d at 560 (citing to *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (citing to various out-of-state cases)).

sion-making power on putative parents, as parentage *in praxi* does.¹²¹ Additionally, visitation can involve restrictions, such as scheduling requirements, supervision, and limited duration.¹²²

F. Uniform Parentage Act

While not a doctrine *per se*, discussion of the Uniform Parentage Act arises in many articles related to the adoption of children conceived through assisted reproductive technology and discussions of “nontraditional families.”¹²³ The Uniform Parentage Act (UPA) is a model statute “promulgated in 1973 and adopted in 19 states.”¹²⁴ The Act was revised in 2000 and amended in 2002.¹²⁵ Some scholars advocate for the usage of the UPA to resolve “disputes between lesbian co-parents and their former same-sex partners.”¹²⁶ However, this article does not advocate for the usage of the UPA over parentage *in praxi* because the UPA does not recognize the increasing prevalence of families with greater than two parents.¹²⁷ Although the 1973 Uniform Parentage Act, when defining the parent-child relationship, initially states that the parent-child relationship exists “between a child and his natural or adoptive parents,” it subsequently implies a two-parent framework by stating that the child-parent relationship “includes the mother and child relationship and the father and child relationship.”¹²⁸ Similarly, the 2002 version of the UPA focuses on defining mothers (e.g., “gestational mother”) and fathers (e.g., “alleged father,” “acknowledged father”, etc.), thus impliedly recognizing only two-parent families.¹²⁹ Tellingly, California adopted the 1973 UPA, but provisions still had to be added to the California Family

¹²¹ See, e.g., *Court Help: Families & Children*, ST. N.Y. CTS. (Apr. 9, 2015), <https://www.nycourts.gov/courthelp/Family/index.shtml> [perma.cc/DFL3-KXP9] (last visited Nov. 19, 2015).

¹²² See *id.*

¹²³ See, e.g., Nancy D. Polikoff, *Response: And Baby Makes . . . How Many? Using In re M.C. to Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple*, 100 GEO. L.J. 2015, 2027 (2012); see also Laura Nicole Althouse, *Three’s Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN’S L.J. 171 (2008); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002).

¹²⁴ See *Why States Should Adopt UPA*, UNIF. L. COMM’N, <http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPA> [perma.cc/UZ6W-NC7R] (last visited Feb. 1, 2013) (The statute “was revised in 2000, and amended in 2002.”).

¹²⁵ See *Acts: Parentage Act*, UNIF. L. COMM’N, <http://uniformlaws.org/Act.aspx?title=Parentage%20Act> [perma.cc/VA7R-8EBZ] (last visited Oct. 6, 2013).

¹²⁶ See Jacobs, *supra* note 123, at 344; see also Althouse, *supra* note 123, at 171.

¹²⁷ See Jacobs, *supra* note 123; see also Althouse, *supra* note 123, at 171.

¹²⁸ See *Uniform Parentage Act: § 1 Parent and Child Relationship Defined*, UNIF. L. COMM’N, <http://www.uniformlaws.org/shared/docs/parentage/upa73.pdf> [perma.cc/78J7-7H78] (last visited Oct. 6, 2013).

¹²⁹ See *Uniform Parentage Act (2002): § 102 Definitions*, UNIF. L. COMM’N, http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf [perma.cc/5XR9-3RGQ] (last visited Feb. 1, 2016).

Code in 2013 in order to provide for families with more than two parents.¹³⁰ The same needed to be done in Delaware, where the legislature had originally adopted the Delaware Uniform Parentage Act from the 1973 UPA.¹³¹

G. Stepparent Adoption/Third-Parent Adoption

Scenario three (presented in the Introduction of this article) addresses third-parent adoption. While third-parent adoption, by its title, would seem to include stepparent adoption, the two legal concepts are very different because stepparent adoption generally requires the termination of one of the “natural” parent’s parental rights.¹³² Thus, stepparent adoption limits a child to two parents. Similarly, while stepparent adoption does expand the category of third parties who can become parents, it is less favorable than that of parentage *in praxi* because it focuses on the legal relationship between a previously-recognized legal parent and a possible third parent rather than focusing on the parent-child relationship. Scenario three was based on the actions of an individual who pursued third-parent adoption in Oregon. Outside of Oregon, some jurisdictions continue to not recognize stepparents as legal parents when a child already has two parents, although the law in those jurisdictions does, at the very least, maintain a child’s ability to inherit from their birth parent:

In a few States, adoption by a stepparent has no effect on a child’s legal right to inherit from either birth parent or other family members. In most States, however, since the child’s legal ties to the noncustodial birth parent are severed by the adoption, the child can inherit from the former birthparent only when the former parent makes provision for the child in his or her written will.¹³³

While this is a step towards recognizing the role that stepparents and third parties can occupy an important role in a child’s life, even the operation of law in this manner does not preserve all of the legal benefits of the parent-child relationship.

Stepparents’ recognition as legal parents becomes a more difficult issue in the context of a family breakup, leading to the possibility of a stepparent becoming the unwilling legal parent of a soon-to-be former stepchild. Stepparents, while identified by a title that includes the word “parent,” are generally not legal parents; many stepchildren already have “original” parents and do not

¹³⁰ See *Acts: Parentage Act (1973)*, UNIF. L. COMM’N, <http://uniformlaws.org/Act.aspx?title=Parentage%20Act%20%281973%29> [perma.cc/8JSR-W52J] (last visited Feb 1, 2016); discussion *supra* Part II.A.3 (discussing the California *de facto* parent statute).

¹³¹ See *Smith v. Gordon*, 968 A.2d 1, 12 (Del. 2009); see also *Bancroft v. Jameson*, 19 A.3d 730, 731 (Del. Fam. Ct. 2010) (“Likely in response to the decision in *Smith v. Gordon*, the Delaware Legislature quickly amended Delaware’s Uniform Parentage Act on July 06, 2009 to include a *de facto* parent provision.”).

¹³² See, e.g., Margaret M. Mahoney, *supra* note 40 at 85.

¹³³ See *Stepparent Adoption*, CHILD WELFARE INFO. GATEWAY (May 2013), https://www.childwelfare.gov/pubpdfs/f_step.pdf [perma.cc/FU49-X7A3].

view their stepparents as their legal parents. Those original parents most likely already have a system in place for the maintenance and support of their natural children. This is especially true for the stepparents of older children. It might be more difficult to stand in the shoes of a parent when the child already has two parents. Even if one of the original parents consent, the older child might practically stand in the way of the caregiving and establishment of the parent-child relationship by a stepparent. Furthermore, if the stepparent is not providing nearly as much financial support as the child's original parent, that individual is not a legal parent.

Scenario four addresses what happens when a widowed and remarried original parent separates from the child's stepparent. Deciding whether the stepparent would become a parent *in praxi* is more difficult in such a scenario, even if the stepparent and the child's birth parent were the only two possible legal parents that the child could have. If the stepparent has provided *some* support, but does not operate in a role that is the same as that of a legal parent (e.g., the child asks the stepparent for some advice but still goes to their original parent for advice on most life matters), then that stepparent is not a parent *in praxi*. Many stepchildren are kind to their stepparents, but it would possibly take far longer for a stepchild, being both older and having had two legal parents (one of whom has died), to feel that a stepparent was that child's legal parent. If the stepparent has not petitioned to become a legal parent at the time of family breakup, that parent should not be *forced* to become the legal parent of a child.

A co-parenting agreement would be helpful in the above situation. For example, in one of the cases cited throughout this article,

[t]he plaintiff and the defendant manifested their level of commitment to each other, to the child, and to their new family by executing and re-executing the co-parenting agreement. In the co-parenting agreement, the parties revealed their beliefs regarding the child's best interests, stating their wish that the child continue his relationship with the plaintiff in the event that the parties' relationship ended.¹³⁴

Not only would a co-parenting agreement aid in the structuring of the family, it would also aid in determining whether an original parent had consented to the parent *in praxi*'s status. It could also outline the exact roles that the individuals would have and offer a starting point for any litigation as opposed to starting in a "vacuum" and attempting to ascertain exactly what the putative parent did.

III. DISADVANTAGES OF PARENTAGE *IN PRAXI*

Parentage *in praxi* has some drawbacks, very similar to de facto parentage. For example, de facto parentage is not available from birth because recognition of de facto parentage generally requires "a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in

¹³⁴ E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999) (citing *Wilcox v. Trautz*, 427 Mass. 326, 334 n. 7 (1998)).

nature.”¹³⁵ Thus, if there were indeed three individuals from the child’s birth who intended to parent the child as legal parents would, another method for recognizing parentage might be more useful.¹³⁶

Further, recognition of de facto parentage or parentage *in praxi* requires judicial action.¹³⁷ This adjudicatory requirement may serve as a hindrance to the operation of normal family life in a situation such as a medical emergency.¹³⁸ While one may have decision-making power within the confines of the family, that decision-making power may not be recognized in situations where legal parentage is necessary, such as when a parent needs to sign a consent form for a medical procedure and there is no time to acquire a parentage decision from a judge.¹³⁹ Families should avail themselves of the rights granted by the doctrine of parentage *in praxi* before a relationship disintegrates or an emergency arises. Otherwise, the advantages it provides may not be available at the very instant they are needed. To make this possible, the regulation of families should be easily comprehensible to the public, making statutes providing for parentage *in praxi* more preferable than doctrinal de facto parentage. Not only are statutes more publicly accessible, but case law may be harder for those without a legal background to understand.

Being a parent means that an individual would have custody of a child. It is most likely that in situations in which a child had three parents, two of those parents would live together. So, while a criticism of parentage *in praxi*, like other forms of recognizing multiple parents, is that too many people could be involved in the child’s life, there is a practical limit on the number of putative parents involved is not boundless. A related criticism of recognizing more than two legal parents is that “[b]ecause legal parents have the right to direct the upbringing of their child, including decisions regarding with whom their child associates, the more adults with full parental rights, the greater the possibility of family strife.”¹⁴⁰ While a child with more parents may receive more economic support, more people are involved in the decision-making related to that

¹³⁵ See DEL. CODE. ANN. tit. 13, § 8-201(c)(3) (2009).

¹³⁶ See, e.g., Melanie Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 440–41 (2005) (noting that “intention has been employed when courts are confronted with determining legal parentage soon after the birth of a child and before a party has invested significant time functioning as a parent. . . . By contrast, functional parenthood doctrine serves as a means of establishing legal parentage after someone has already assumed the responsibilities of parenthood and wishes to legalize the parent child relationship. Initial intent to parent often leads to functional parenthood but there may be instances in which someone meets the criteria of a functional parent but did not intend to ‘bring about the birth of the child.’”).

¹³⁷ See MOVEMENT ADVANCEMENT PROJECT ET AL., *supra* note 68, at 42.

¹³⁸ *Id.* at 87.

¹³⁹ *Id.*

¹⁴⁰ See Appleton, *supra*, note 17, at 275.

child.¹⁴¹ Similarly, custody is both legal (involving decision-making) and residential or physical, but limits are placed on the amount of residential or physical custody that “noncustodial” parents have.¹⁴² Thus, while coordinating schedules and ensuring that multiple people are able to see a child can be difficult (especially if those individuals live in different households), the best interests of the child standard operates so as to prevent visitation from operating to the detriment of the child’s well-being. For example, even if a child had three parents who lived in three different homes, it is unlikely that a family court judge would decide that “splitting” a child’s time equally amongst three homes was in the best interests of the child. Similarly, while some scholars would oppose the availability of a doctrine like parentage *in praxi* because it creates a “greater possibility of family strife” it is quite possible that in a situation where parentage *in praxi* would apply, there had already been family strife. Such strife or the possibility of it should not prevent a child from maintaining contact with his or her putative parent. For the child, all of these individuals compose the family, and the child needs to maintain his or her relationships within that family.

It is also worth noting that parentage *in praxi* would not resolve the issue that was the basis for Scenario two—which was the situation present in *Michael H. v. Gerald D.*—where the father of a child who was the product of an extramarital affair unsuccessfully petitioned for parental rights.¹⁴³ Reading the factual overview provided by Justice Scalia, it appears that Michael H., the child’s genetic father, was only in the shoes of a parent for three months in 1982 and eight months from 1983 to 1984, thus falling short of the two years required to establish de facto parentage and parentage *in praxi*. As an additional note, the consent requirement of de facto parentage and parentage *in praxi* may influence one’s ability to comply with the duration requirement; if the original parent does not consent to a putative parent becoming a legal parent, then it will be difficult for that putative parent to stand in the shoes of a parent for the requisite amount of time.

IV. THE NEXT FRONTIER: SCIENTIFIC POSSIBILITY OF CHILDREN WITH THREE GENETIC PARENTS

The analysis in this article may apply in the near future to children of same-sex couples who are biologically related to all of their putative parents, even if there are more than two of them. Scientists at Newcastle University in the United Kingdom have refined a laboratory procedure called mitochondrial

¹⁴¹ See, e.g., *Custody*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“legal custody (18c) 1. CUSTODY (2). 2. CUSTODY (3). 3. The authority to make significant decisions on a child’s behalf, including decisions about education, religious training, and healthcare.”).

¹⁴² See, e.g., *Frequently Asked Questions: Child Custody/Visitation*, N.Y. COURTHelp, <http://nycourts.gov/courthelp/Family/custody.shtml> [perma.cc/B9ZA-2AKJ] (last visited Feb. 1, 2016).

¹⁴³ See 491 U.S. 110 (1989).

transfer, which would result in the creation of children with three genetic parents.¹⁴⁴ The United States Food and Drug Administration is considering whether to approve further research on the technique involving human experimentation.¹⁴⁵ The procedure is partially aimed at preventing genetic diseases. During the mitochondrial transfer, scientists use a portion of DNA from a healthy female donor instead of the portion of the intended mother's DNA (specifically, the mitochondria). Defective mitochondria are responsible for "genetic disorders such as muscular dystrophy and heart and liver conditions."¹⁴⁶ After the donor's mitochondria are used to replace the mitochondria of the biological mother (the mother who would provide the largest percentage of female DNA), the resultant healthy embryo would be used in the typical *in vitro* fertilization treatment process.¹⁴⁷ These resultant embryos contain the DNA of three individuals.¹⁴⁸ The mitochondrial transfer procedure is so new that it has never been tested in a full-term birth.¹⁴⁹

Before February 2015, the embryos created through mitochondrial transfer could not legally be used in the United Kingdom in human *in vitro* fertilization. After a public consultation, the United Kingdom's Human Fertilisation and Embryology Authority "concluded there was 'general support' for the idea and that there was no evidence that the advanced form of IVF was unsafe."¹⁵⁰ The United Kingdom's Department of Health produced draft regulations, and the House of Lords approved an amendment to the Human Fertilisation & Embryology Act.¹⁵¹

The procedure has prompted similar skepticism in the United States, where the United States Food and Drug Administration spent one-and-a-half days discussing "oocyte modification in assisted reproduction for the prevention of transmission of mitochondrial disease or treatment of infertility."¹⁵² Though the process has not yet been approved for human testing, such a technological ad-

¹⁴⁴ See Ian Sample, *Three-person IVF: UK Government Backs Mitochondrial Transfer*, GUARDIAN, (June 28, 2013, 3:54) <http://www.theguardian.com/science/2013/jun/28/uk-government-ivf-dna-three-people> [perma.cc/6TU8-VM55].

¹⁴⁵ See *Cellular, Tissue, and Gene Therapies Advisory Committee Meeting: Announcement*, U.S. FOOD AND DRUG ADMIN. (Feb. 25–26, 2014), <http://www.fda.gov/advisorycommittee/s/committeesmeetingmaterials/bloodvaccinesandotherbiologics/cellulartissueandgenetherapi esadvisorycommittee/ucm380047.htm> [perma.cc/FR2L-BE99] [hereinafter *Cellular*].

¹⁴⁶ See Sample, *supra* note 144.

¹⁴⁷ See Press Release, *HFEA Launches Public Consultation, Medical Frontiers: Debating Mitochondria Replacement*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY (Sept. 17, 2012), <http://www.hfea.gov.uk/7517.html> [perma.cc/6XA7-YPDW].

¹⁴⁸ *Id.*

¹⁴⁹ See *id.*; Sample, *supra* note 144.

¹⁵⁰ See James Gallagher, *UK Government Backs Three-Person IVF*, BBC NEWS (June 28, 2013), www.bbc.co.uk/news/health-23079276 [perma.cc/DJK5-B43L].

¹⁵¹ See Brittany Shoot, *3-Parent IVF: Why Isn't It Available in the United States?*, GUARDIAN (Feb. 27, 2015, 10:22 PM), <http://www.theguardian.com/sustainable-business/2015/feb/27/3-parent-ivf-us-mitochondria-dna-babies> [perma.cc/C589-8JBF].

¹⁵² See *Cellular*, *supra* note 145.

vance will compel family law to further alter its conception of parentage. The doctrine of parentage *in praxi*, or the statutory recognition of three or more putative parents, anticipates the potential challenges that could arise if three parent *in vitro* fertilization is ever used for non-therapeutic purposes.

CONCLUSION

Family structures with stepparents, same-sex relationships (and marriage), friends (who might be genetically related to the child), and other putative parents who are not just “helping out” are becoming increasingly common. The individuals who fulfill all of the roles of traditional parentage should be recognized as parents by the law, even if this results in children having more than two parents. Recognizing new forms of parentage such as parentage *in praxi* affords both putative parents and their children legal protection of their relationships.

This article makes three major conclusions. First, the law should recognize those individuals who meet the statutory requirements of parentage when it is in the best interests of the child. Second, if statutory guidelines for the identification of parents *in praxi* do not exist, then a state should develop them, following the examples of Washington, D.C., and Delaware. At minimum, a state could provide a statutory basis for a child to have more than two parents (as in California). Third, using parentage *in praxi* (or a statute that protects children’s relationships with all of their putative parents) to recognize putative parents as legal parents furthers a child’s best interests by (1) creating limitations on decisions related to the child and (2) creating legal mechanisms for ensuring stability, permanency, financial commitment, etc. within families.